No. 47392-5-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH A. PEEBLES, JR.

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 13-1-03732-9

REPLY BRIEF OF APPELLANT

BRETT A. PURTZER
WSB #17283

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

Table of Contents

TABLE OF AUTHORITIES

Cases

I. STATEMENT OF THE CASE

Appellant relies upon the statement of the case set forth in his opening brief.

II. ARGUMENT

A. INSUFFICIENT EVIDENCE EXISTS TO ESTABLISH THAT ANY TOUCHING BY MR. PEEBLES WAS FOR SEXUAL GRATIFICATION.

In response to appellant's argument, the State relies upon State v. Harstad, 153 Wn.App. 10, 218 P.3d 624 (2009). Although the State suggests that the evidence in the present case is "remarkably similar" to that in Harstad, nothing could be more inaccurate. Harstad involved egregious conduct that clearly supported a finding of sexual contact. Further, Harstad did not involve the fact that the defendant was asleep at the time the touching occurred.

Here, the touching event was denied by Mr. Peebles as Mr. Peebles was asleep when the event occurred, and passed out and incoherent when he was contacted by Mr. Parish, A.P.'s father, after she complained of Mr. Peebles being in her bed. Inadvertent contact does not satisfy sexual contact when the contact was not done for purposes of sexual gratification. Further, our courts have held that when the touching occurs over the clothing, the courts have required additional evidence of sexual gratification. See State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991) (Evidence insufficient to support an inference defendant

touched minor for purposes of sexual gratification. No rational trier-of-fact could find this essential element beyond a reasonable doubt.)

Here, it is equivocal as to the nature of the touching engaged in by Mr. Peebles, A.P. was inconsistent in her testimony regarding what touching occurred, and at no time did Mr. Peebles have skin-to-skin contact with A.P. Because there was no additional evidence of sexual gratification aside from what was produced in court, insufficient evidence exists to sustain the conviction. As such, and as supported by both Powell and by Weisberg, insufficient evidence exists to establish that any touching by Mr. Peebles was for purposes of sexual gratification.

B. THE PROSECUTOR'S MISCONDUCT DENIED MR. PEEBLES A FAIR TRIAL.

As set forth in appellant's opening brief, this was a very close case. In order to review the issue of prosecutorial misconduct, the misconduct must be viewed in light of the evidence in the case. Here, the prosecutor's introduction of the DNA evidence, which violated the Court's earlier in limine order, and her closing remarks clearly support a finding of prejudicial prosecutorial misconduct which denied Mr. Peebles a right to a fair trial.

Counsel's personal comments were inappropriate in her closing argument. Significantly, when the court overruled defense counsel's objection, the Court's ruling emboldened the prosecutor.

- "What does alcohol not do? It does not make a criminal act not criminal. Claims of alcoholic blackout are self-reported. They obviously have an insensitive, and they're seeking to avoid responsibility for their deviant behavior. This

> claim of alcoholic blackout is a farce. Being drunk is one thing. What he's claiming is something entirely different, that after two beers he blacks out, can't remember anything. That's just ridiculous, ladies and gentlemen. It's the claim" – RP 377:5-14.
>
> - Mr. Girard: "I'd object to that characterization, Your Honor." RP 377:15-16.
>
> - The Court: "It's argument, Counsel. Your objection is noted for the record." RP 377:17-18.
>
> - Ms. Williams: "The defendant's claim and his version is ridiculous, and it's not supported by the evidence in any single way." RP 377:19-21.

Even the State acknowledges that more professional arguments could have been made by the trial prosecutor, which is an understatement. Further this was not "characterizing evidence or testimony". Rather it was the prosecutor's opinion that the testimony was "ridiculous". The State argues, if not acknowledges, that even though the use of the word "ridiculous" may have been misconduct, it was not "prejudicial misconduct". The problem, however, is that "it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion." State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990). As such, the prosecutor's argument, in light of all the evidence, was prejudicial. Respectfully, the prosecutor committed prejudicial misconduct, which denied Mr. Peebles' right to a fair trial.

C. REMAINING ASSIGNMENTS OF ERROR

Mr. Peebles relies upon his opening brief that sufficiently addresses the ineffective assistance of counsel claim and the cumulative error claim.

III. CONCLUSION

Based upon the aforementioned, Mr. Peebles respectfully urges this Court to reverse his conviction and grant him a new trial.

DATED this 17th day of September, 2015.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By: _____
BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

Kenneth Peebles, Jr.
DOC #375898
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

Signed at Tacoma, Washington, this 17th day of September, 2015.

Kathy Herbstler

HESTER LAW OFFICES

September 17, 2015 - 3:22 PM

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brett@hesterlawgroup.com
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